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No. 88-703

In The

Supreme Court of the United States

October Term, 1988

THE CELOTEX CORPORATION and
RAPID-AMERICAN CORPORATION,

Petitioners,

v.

SMITH LAND & IMPROVEMENT CORPORATION,

Respondent.

BRIEF OF RESPONDENT SMITH LAND & IMPROVEMENT CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF QUESTIONS PRESENTED

I. Whether Petitioners establish the special and important reasons necessary for this Court to exercise its extraordinary and discretionary jurisdiction.

II. Whether this Honorable Court should exercise its extraordinary and discretionary jurisdiction and review an issue which was not properly raised before the Third Circuit and which asks this Court to assume a role it has historically declined.

III. Whether this Honorable Court should review the Third Circuit's decision to apply the well-established doctrine of corporate successor liability under CERCLA where that decision is consistent with case law, Congressional intent and would effectuate the remedial purposes of CERCLA.

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BRIEF OF RESPONDENT SMITH LAND & IMPROVEMENT CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Smith Land & Improvement Corporation (hereinafter Smith Land), files this Brief in Opposition to the Petition for Writ of Certiorari of Petitioners, the Celotex Corporation and Rapid-American Corporation, from a Judgment of the United States Court of Appeals for the Third Circuit. Smith Land respectfully urges this Honorable Court to deny the Petition for Writ of Certiorari in this case.

STATEMENT OF THE CASE

This matter is before the Court on a Petition for Writ of Certiorari from a Judgment of the United States Court of Appeals for the Third Circuit which found that liability under the Comprehensive Environmental Response, Compensation and Liability Act (hereinafter "CERCLA"), 42 U.S.C. § 9601 *et seq.*, will be imposed on corporations which are successors through statutory mergers of a corporation which is a responsible party[1] as defined under CERCLA.

This case involves a contribution action brought by Smith Land against The Celotex Corporation (hereinafter Celotex) and Rapid-American Corporation (hereinafter Rapid-American) to recover response costs incurred by Smith Land to clean up asbestos wastes which were generated and transported by the predecessor corporation to Celotex and Rapid-American.

The District Court for the Middle District of Pennsylvania granted summary judgment in favor of Celotex and Rapid-American, and against Smith Land. Although the District Court found that Celotex and Rapid-American were responsible parties and thus liable under CERCLA, the Court accepted as a defense to liability in this case the doctrine of caveat emptor.

The district court's order was reversed by the Third Circuit, which ruled in an Opinion by the Honorable Joseph F. Weiss, Jr., that the district court erred in holding that the doctrine of caveat emptor is a permissible defense to

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[1]"Responsible party" refers to one of a class of persons to which CERCLA assigns liability under Section 107(a), 42 U.S.C. 9607(a).

liability for contribution under CERCLA,[2] and that the general doctrine of corporate successor liability is appropriate in CERCLA contribution claims. The Third Circuit found that those same concerns which have led to the application of corporate successor liability in tort law are equally applicable when assessing responsibility for clean-up costs under CERCLA. Specifically, the Court noted the remedial nature of CERCLA "whose primary aim is to correct the hazardous condition." 851 F.2d at 91. The Court further stated that:

> Just as there is liability for ordinary torts or contractual claims, the obligation to take necessary steps to protect the public should be imposed on a successor corporation.

Id.

The Third Circuit remanded the matter to the district court for proceedings consistent with its Opinion. After the Third Circuit denied their petition for rehearing en banc, Celotex and Rapid-American filed the present Petition for Writ of Certiorari with this Court.

Before addressing Celotex and Rapid-American's reasons in support of their Petition, certain factual points should be noted.

First, although apparently unwilling to do so for purposes of their Petition,[3] both Celotex and Rapid-American have previously admitted to being successor corporations

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[2]Celotex and Rapid-American, however, have not challenged this ruling in their Petition.

[3]At page 8 of their Petition, Celotex and Rapid-American refer to Philip Carey as the "alleged predecessor," and in note 4 declare only that they "are alleged to have succeeded to Philip Carey's liabilities through a series of statutory mergers."

to the Philip Carey Manufacturing Company (hereinafter Philip Carey), and that the mergers which affected the joining of corporate entities were statutory mergers. (Celotex App. 568a; Rapid-American App. 450a). Indeed, such has been the holding of various courts which have considered this issue. *See, e.g., Tippens v. Celotex Corp.*, 805 F.2d 949, 951 N.2 (11th Cir. 1986) ("Philip Carey is the predecessor company to Celotex Corporation"); *Neal v. Carey Canadian Mines, Ltd.*, 548 F. Supp. 357, 365 (E.D. Pa. 1982), *aff'd sub nom., Van Buskirk v. Carey Canadian Mines, Ltd.*, 760 F.2d 481 (3d Cir. 1985) (Celotex is the "successor-in-interest" of Philip Carey); *Weldon v. Celotex Corp.*, 695 F.2d 67, 68 (3d Cir. 1982) (Celotex is the "successor in interest" to Carey); *Celotex Corp. v. Picket*, 490 So.2d 35, 37 (Fla. 1986) ("Celotex has admitted that it is liable, because of the merger, for the compensatory damages awarded. . . ."); *Tretter v. Rapid-American Corp.*, 514 F. Supp. 1344, 1347 (E.D. Mo. 1981) (Rapid-American is "the successor corporation to Philip Carey Manufacturing Company").

Philip Carey operated a manufacturing plant at Plymouth Meeting, Pennsylvania from 1906 to 1961. This facility was involved in the manufacture and distribution of high temperature industrial insulation products. At Plymouth Meeting, Philip Carey manufactured products containing asbestos fibers ranging in content from 11% to 25%. (Celotex App. 34a-35a; Rapid-American App. 75a-76a).

The manufacturing process at the Plymouth Meeting Plant produced waste products which contained asbestos.[4]

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[4]Asbestos is a hazardous substance as defined in Section 101(14) of CERCLA, 42 U.S.C. § 9601.

Scrap material containing asbestos was routinely disposed by Philip Carey by dumping it onto a 20-acre waste dump known as Whiting Lake (hereinafter facility).[5] *Id.* Philip Carey was the owner of the Plymouth Meeting facility at the time of the disposal of the asbestos waste, it was the generator of the asbestos waste, and it was the transporter of the waste. *Id.*

In 1963, Smith Land's predecessor purchased the 160-acre tract of land owned by Philip Carey which included the 20-acre pile containing the asbestos waste. Neither Smith Land, its predecessor corporations, nor related corporations have ever been involved in any manner with the manufacture, generation, or disposal of asbestos or products containing asbestos. At no time prior to March 20, 1984, was Smith Land aware that asbestos was a hazardous material. (Celotex App. 339a-340a; Rapid-American App. 416a-418a).

In 1984, the United States Environmental Protection Agency (hereinafter EPA) made a determination that releases of asbestos, a hazardous substance, had occurred from the facility and that there was a substantial threat of releases of asbestos from the facility and into the environment. (Celotex App. 45a, 54a-55a; Rapid-American App. 49a, 60a-66a). On or about July 31, 1984, EPA informed Smith Land that is was a potentially responsible party un-

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[5]In support of its motion for partial summary judgment, Smith Land offered the trial testimony of a former employee of Philip Carey who testified in a personal injury (asbestosis) action against Celotex, *Neal v. Carey Canadian Mines, Ltd.*, 548 F.Supp. 357 (E.D. Pa. 1982), *aff'd sub nom., Van Buskirk v. Carey Canadian Mines, Ltd.*, 760 F.2d 481 (3d Cir. 1985), that for years, on a daily basis, he dumped hazardous asbestos waste onto the facility.

der CERCLA and that it would be required to reimburse the federal government for clean-up costs with respect to the asbestos unless Smith Land undertook the clean-up itself.

Under threat of enforcement action by EPA, Smith Land conducted a remedial program in 1984 and 1985, spending a total of $218,945.44 in connection with its clean-up efforts. Thereafter, Smith Land signed a consent agreement and order with EPA which formally settled EPA's claims against Smith Land.

Before reaching a settlement with the EPA, Smith Land notified Celotex and Rapid-American of its intention to seek indemnification for the costs of the clean-up. When both Celotex and Rapid-American refused to do so, Smith Land initiated its lawsuits alleging causes of action under CERCLA, as well as other state and common law theories of recovery.

SUMMARY OF ARGUMENT

Petitioners, Celotex and Rapid-American, fail to establish the "special and important" reasons required before this Court will exercise its extraordinary and discretionary jurisdiction.

The decision of the Third Circuit which is the subject of this Petition, correctly concluded that the doctrine of corporate successor liability is applicable to contribution actions under CERCLA.

In order for this Court to grant certiorari based on the reasons set forth by Petitioners, it would first have to agree to review an issue which was not properly raised before the Third Circuit. Moreover, Petitioners are ask-

ing this Court to substitute its view of the facts for those of the district court and Third Circuit, a role which this Court has continually eschewed.

Petitioners are also asking this Court to review a decision by the Third Circuit which is consistent with every case which has considered the issue of corporate successor liability under CERCLA. Indeed, Petitioners fail to cite a single case in which a successor corporation was relieved of liability because of its successor status, whether that be under CERCLA, another statutory scheme or general principles of contract or tort law.

Moreover, the Third Circuit's decision is consistent with the Congressional intent behind CERCLA—to clean up hazardous waste sites. Under Petitioners' view of statutory interpretation, corporations would be able to use a statutory merger to avoid and divest themselves of CERCLA liability for past generation and disposal of waste. Judicial acceptance of such an "escape clause" would frustrate the goals of CERCLA and would be contrary to Congressional intent.

This case is not deserving of this Court's extraordinary and discretionary jurisdiction.

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ARGUMENT

I. PETITIONERS FAIL TO ESTABLISH THE SPECIAL AND IMPORTANT REASONS NECESSARY FOR THIS COURT TO EXERCISE ITS EXTRAORDINARY AND DISCRETIONARY JURISDICTION.

The denial of the writ of certiorari in this case would be demonstrably consistent with the principles which gov-

ern the exercise of certiorari jurisdiction. Petitioners have not advanced a single "special or important" reason which would justify review of the decision below.[6]

In explaining its certiorari jurisdiction, this Court stated in *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498 (1951) that:

> Certiorari is granted only "in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal. (Citations omitted.)

Former Chief Justice Vinson similarly described this function of the Court as one,

> to resolve conflicts of opinion on federal questions that have arisen among the lower courts, to pass upon questions of wide import under the Constitution, laws and treaties of the United States, and to exercise supervisory power over lower federal courts. . . . [T]he Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance beyond the particular facts and parties involved.

Work of the Federal Courts, 69 S.Ct. V, VI (September 7, 1949.).[7]

Celotex and Rapid-American obviously cannot claim in their Petition that the Third Circuit's decision to apply corporate successor liability under CERCLA in this case is in conflict with the decision of another federal court of

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[6]Supreme Court Rule 17, Sup. Ct. R. 17, sets forth the character of reasons which this Court would consider to be "special and important."

[7]Before the American Bar Association.

appeals, or the decision of a state court of last resort. Indeed, Celotex and Rapid-American fail to cite a single case where a successor corporation was found not liable because of its successor status.

What Celotex and Rapid-American do claim is, first, that the Third Circuit ignored prior decisions of this Court by failing to affirm the district court's order when, according to Petitioners, there existed an adequate ground for so doing. As will be set forth more fully in the following section of this Argument, this claim is both misleading and incorrect.

The alleged alternative ground—no admissible evidence to show that Petitioners' predecessor, Philip Carey, would have been liable under CERCLA—was not considered by the Third Circuit because neither Celotex nor Rapid-American filed a cross-appeal from the district court's conclusion that both companies *are* responsible parties under CERCLA.

Moreover, by failing to raise this issue before the Third Circuit and by raising this issue here, Celotex and Rapid-American are asserting a ground for the granting of certiorari which should be rejected by this Court. *See Helvering v. Pfeiffer*, 302 U.S. 247 (1937).

Finally, even if this issue had been properly preserved by Petitioners, this particular challenge to the Third Circuit's decision is not the type of question which deserves consideration by this Court. In *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 503 (1951), this Court stated: "This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place, we would

find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way."

Celotex and Rapid-American's second reason in support of their Petition is that the Third Circuit's decision to apply corporate successor liability to CERCLA contribution claims is unsupported by the language of the statute, is contrary to Congressional intent and would have a paralyzing effect on corporate mergers.

As set forth more fully below, the application of corporate successor liability to contribution claims under CERCLA is consistent with a well established principle of corporate law. It is equally consistent with those federal court decisions which have recognized the remedial nature of CERCLA and, consequently, have given it a broad and liberal construction. It is the Petitioners' interpretation of CERCLA—that corporations be able to use a statutory merger to avoid and divest themselves of all CERCLA liability for past generation and disposal of hazardous wastes—which would be totally contrary to the intent of Congress, federal case law and public policy.

All that Celotex and Rapid-American are successful at demonstrating in their Petition is that they disagree with the Third Circuit's decision. As this Court has noted, "this Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review." *Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974). Thus, for the reasons that follow, this Honorable Court should refrain from further consideration of this case.

II. PETITIONERS' CLAIM THAT THE THIRD CIRCUIT'S DECISION IS INCONSISTENT WITH DECISIONS OF THIS HONORABLE COURT IS WHOLLY WITHOUT MERIT.

A. Introduction

In order to decide a contribution case under CERCLA, it must be determined initially whether the parties can be held jointly and severally liable. In deciding the issue of joint liability, the Court must initially determine whether the defendant in an action is a "responsible person" as that term is defined under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and thus liable under the statute.[8]

Liability under section 107(a) extends to four classes of persons:

> (1) current owners and operators of facilities where substances have been deposited,
>
> (2) persons who owned or operated a facility at the time of disposal of hazardous substances,
>
> (3) persons who arranged for the treatment or disposal of hazardous substances at the facility, and
>
> (4) persons who transported hazardous substances to the facility.[9]

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[8]Section 113(F)(1) of CERCLA, 42 U.S.C. § 9613(F)(1) (Supp. 1987), states in relevant part that "[a]ny person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title." Section 113(f) was added to CERCLA by the Superfund Amendments and Reauthorization Act, Pub. L. No. 99-499, § 113, 100 Stat. 1647 (1986) ["SARA"].

[9]Section 107(a) is reprinted in its entirety at page 3 of the Petitioners' Appendix.

Thus, in the present case, the questions to be considered initially by the district court were (1) whether Philip Carey, if it were still in existence, would be a responsible party under CERCLA either because it owned or operated the facility at the time of disposal of hazardous substances, or because it actually generated and disposed of hazardous wastes on the property; and, if so, (2) whether Celotex and Rapid-American, as successors-by-merger to Philip Carey, are thus liable under CERCLA.

B. Petitioners Fail To Demonstrate Why This Honorable Court Should Exercise Its Extraordinary And Discretionary Jurisdiction And Review An Issue Which Was Not Properly Raised By Petitioners Before The Third Circuit.

The thrust of the Petitioners' claim is that the Third Circuit incorrectly granted summary judgment in favor of Smith Land when, according to Petitioners, there existed an alternative ground for affirming the district court's entry of summary judgment in favor of the Petitioners. This ground, Petitioners assert, is Smith Land's failure to offer admissible evidence to show that Philip Carey, as predecessor corporation to Celotex and Rapid-American, would have been a responsible party and thus liable under CERCLA.

However, Petitioners never raised this argument in their motions for summary judgment,[10] the district court

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[10]Indeed, Celotex and Rapid-American admit at page 11, note 7 of their Petition that their respective motions for summary judgment *never* raised as a ground the absence of admissible evidence to show that Philip Carey would have been liable under CERCLA.

found Celotex and Rapid-American to be responsible persons under CERCLA, and Petitioners failed to file a cross-appeal from that adverse part of the district court's decision.

Notwithstanding the Third Circuit's failure to determine that Philip Carey previously owned the facility and/or generated the asbestos waste on the facility, the district court did find that Celotex and Rapid-American are responsible parties under CERCLA. This is evidenced by the district court's adoption of the Magistrate's Report in *Smith Land & Improvement Corporation v. The Celotex Corporation*, No. 86-1151 (M.D. Pa., June 16, 1987), which found that asbestos had been deposited on the subject property when it had been owned by Philip Carey. The Magistrate's report stated:

> *The defendant Celoter here, like the defendant Rapid-American in that case, is a successor corporation to the Philip Carey Manufacturing Company and other companies which owned the Plymouth Meeting Land involved in these cases at the time when asbestos was dumped upon the land.* (Emphasis added).

Id., Slip. op. at 7(a). In adopting this report, the district court concluded that Philip Carey falls within the class of statutorily defined responsible persons under Section 107(a) of CERCLA, 42 U.S.C.S. 9607(a).

It was clearly this finding, together with its finding that Celotex and Rapid-American were successors by merger to Philip Carey, which led the district court to note that: "[t]he EPA could have proceeded against the plain-

tiff [Smith Land] or the defendant [Rapid-American],"[11] for the costs incurred in removing or remedying the hazardous waste problem at the Plymouth Meeting plant facility. Thus, the district court concluded that Rapid-American and Celotex are responsible persons under CERCLA.

As noted previously, neither Celotex nor Rapid-American filed a cross-appeal from that adverse part of the district court's decision. By failing to do so, each has waived any argument pertaining to the conclusion reached by the district court that the defendants are responsible persons under the law. *United States v. American Railway Express Co.*, 265 U.S. 425, 435 (1924).

In *American Railway*, Justice Brandeis stated:

> It is true that a party who does not appeal from a final decree of the trial court cannot be heard in opposition thereto when the case is brought here by the appeal of the adverse party. *In other words, the appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the right of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below.* But it is likewise settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it. (Emphasis added.)

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[11]The District Court also stated that the facts and circumstances involving Smith Land's action against Celotex were identical to those raised in Smith Land's contribution action against Rapid-American. Consequently, the Court also concluded that Celotex, like Rapid-American, is a responsible person under CERCLA.

Id. See also, Trustees of Atlanta Ironworkers, Local 387 Pension Fund v. Southern Stress Wire Corp., 724 F.2d 1458, 1459 (11th Cir. 1983); *David v. City of Scranton*, 633 F.2d 676, 677 n.1 (3d Cir. 1980).

Moreover, the failure of Petitioners to cross appeal from the adverse part of the District Court's decision—that both are responsible persons under CERCLA—precludes subsequent review by this Honorable Court. *See Penfield Co. v. Securities & Exchange Commission*, 330 U.S. 585 (1947).[12]

Petitioners' reliance on this Court's decision in *Helvering v. Gowran*, 302 U.S. 238 (1937), *reh'g denied*, 302 U.S. 781 (1938), is misplaced. In *Helvering*, the alternate ground raised for the first time before the court of appeals supported the one question addressed below, and was raised by a party in whose favor judgment was issued.[13] Here, there were two questions before the district court—the liability of Petitioners under CERCLA and the appli-

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[12]In *Penfield*, the district court found the petitioner to be in civil contempt for failing to produce certain documents to the Securities and Exchange Commission, but imposed a monetary fine rather than grant any coercive relief designed to force the petitioner to produce the documents. On appeal by the Commission, the court of appeals reversed, holding that the district court erred in imposing the fine and ordered coercive relief. On appeal to this Court, petitioner sought to challenge the merits of the original judgment of contempt. This Court stated: "These were considered and determined against him by the District Court. Since he did not appeal from that adverse judgment, he is precluded from reviewing the objections at this stage." *Id.* at 594 (citations omitted).

[13]As this Court noted in *Helvering*, the ultimate question below, before the Board of Tax Appeals, was whether the Board erred in affirming the determination that additional taxes were due.

cation of caveat emptor—with the question of CERCLA liability being decided adversely to Petitioners.

Thus, Petitioners' attempt now to attack this adverse ruling without having properly raised it before the Third Circuit ignores the fundamental teaching of this Court that "an appellee cannot without a cross-appeal attack a judgment entered below." *Helvering v. Pfeiffer*, 302 U.S. 247, 251 (1937) (citations omitted). For this reason alone, Petitioners' contention should be rejected by this Court.

C. Petitioners' Challenge To The Admissibility Of Evidence Showing That Petitioners Are Responsible Persons Under CERCLA Asks This Court To Assume A Role It Has Historically Declined.

Even if Celotex and Rapid-American had preserved the issue of whether they are responsible persons under CERCLA, their argument asks this court to substitute its view of the facts for those of the district court and Third Circuit, a role which this Court has eschewed for decades. *See United States v. Johnston*, 268 U.S. 220, 227 (1925) "We do not grant a certiorari to review evidence and discuss specific facts").

This Court has authoritatively announced that controversies such as that raised by Petitioners here are not for this Court. In *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 503 (1951), this Court declared that: "[t]his is not the place to renew a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other,

though fair minded judges could find it tilting either way.''[14]

Here, the Third Circuit chose to assume rather than determine that Philip Carey previously owned the facility and produced the asbestos waste on the facility. As in the past, this Honorable Court should deny Petitioners' request and refrain from performing a task which it has repeatedly declared is not to be served by a grant of certiorari.

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[14]Contrary to Petitioners' claim, the evidence at issue here *is* admissible as to both Celotex and Rapid-American. Pursuant to Rule 804(b)(1) of the Federal Rules of Evidence, 804(b)(1) Fed. R. Evid., testimony given by a witness at another hearing or in a deposition is admissible as an exception to the hearsay rule, where the party against whom the evidence is offered had an opportunity and similar motive to cross-examine the witness and the declarant is now unavailable. *Lloyd v. American Export Lines, Inc.*, 580 F.2d 1179 (3d Cir. 1978), *cert. denied*, 439 U.S. 969 (1978). In *Neal v. Carey Canadian Mines, Ltd.*, 548 F. Supp. 357 (E.D. Pa. 1982), *aff'd sub nom., Van Buskirk v. Carey Canadian Mines, Ltd.*, 760 F.2d 481 (3d Cir. 1985), Celotex was a party defendant in an asbestosis case in which the plaintiffs sought substantial damages. Celotex actively cross-examined the witness. Actual and punitive damages awarded totalled more than one half million dollars. In addition, the witness, Harry Belz, is now deceased and is unavailable as a witness.

As to Rapid-American, Rule 804(b)(1) requires that Rapid-American have had a predecessor in interest at the former proceeding. A "predecessor in interest" has been interpreted to mean one who had an opportunity and similar motive to develop the testimony about the same material facts by cross-examination. *Lloyd v. American Export Lines, Inc., supra.* Clearly, Celotex had the motive to do so as an obvious defense to the personal injury claim for asbestosis, and one which Celotex has raised in the past, is that the claimant had not been exposed to its asbestos products. *See Celotex v. Catrett*, 477 U.S. 317, 319 (1986) (Summary judgment granted in favor of Celotex because claimant unable to produce evidence in support of allegation that decedent had been exposed to Celotex' asbestos products).

III. PETITIONERS FAIL TO DEMONSTRATE SPECIAL AND IMPORTANT REASONS WHY THIS COURT SHOULD REVIEW THE THIRD CIRCUIT'S DECISION TO APPLY THE WELL ESTABLISHED DOCTRINE OF CORPORATE SUCCESSOR LIABILITY UNDER CERCLA WHERE THAT DECISION IS CONSISTENT WITH CASE LAW, CONGRESSIONAL INTENT AND WOULD EFFECTUATE THE REMEDIAL PURPOSES OF CERCLA.

A. Introduction

As correctly noted by the Third Circuit, "[c]orporate successor liability is neither completely novel nor of recent vintage." 851 F.2d at 91. The law is clear that in a statutory merger, the surviving corporation assumes the liabilities of the merging corporation by operation of law. H. Henn, *Law of Corporations*, 713 (2d ed. 1970). This rule is expressly stated in the statutes of the relevant states[15] and has been repeatedly enforced by the courts. *See, e.g., Neal v. Carey Canadian Mines, Ltd.*, 548 F. Supp. 357 (E.D. Pa. 1982), *aff'd sub nom., Van Buskirk v. Carey Canadian Mines, Ltd.*, 760 F. 2d 481 (3d Cir. 1985).

The Third Circuit also correctly noted that both Celotex and Rapid-American chose to use the statutory merger as an acquisition vehicle and, as such, they accepted and assumed all the liabilities of Philip Carey whether known

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[15] *E.g.*, Delaware Business Corporation Law, 8 Del. C. § 259 (Michie 1983) ("all . . . liabilities and duties of the respective constituent corporations shall thenceforth attach to said surviving or resulting corporation, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it."); Mich. Stat. Ann. § 21.200 (722) (Callaghan 1983); Ohio Rev. Code Ann. § 1701.82 (Baldwin 1986).

or unknown, certain or contingent. Thus, Celotex and Rapid-American in their Petition are asking this Court to ignore a theory of liability which is not only deeply embedded in our legal system, but also is particularly vital to effectuate the purposes of remedial legislation such as CERCLA.

B. Petitioners Fail To Cite A Single Case Where A Successor Corporation Has Been Found Not Liable Because Of Its Successor Status.

As noted previously, the Petitioners fail to cite a single case in which a successor corporation was exonerated from liability because of its successor status. Contrary to the Petitioners' contention at pages 18 and 19 of their Petition, the Court in *Cadillac Fairview/California Inc. v. Dow Chemical Co.*, 14 Envtl. L. Rep. (Envtl. L. Inst.) 20376 (C.D. Cal. 1984), *rev'd on other grounds*, 18 Envtl. L. Rep. (Envtl. L. Inst.) 20470 (D.C. Cir. February 25, 1988), did not exonerate the defendant because it was a successor corporation. On the contrary, the court reached this conclusion because the predecessor was not liable under CERCLA. Because a successor's liability can only be based on that of its predecessor, the court concluded that the successor was not liable.[16]

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[16]The *Cadillac/Fairview* Court first recognized that the defendant Cabot, Cabot & Forbes Interim was sued as a successor-in-interest to two previous entities; International Property Development Co. and CC & F Western Development Co. It then turned to an analysis of the predecessors' activities. The court noted that neither predecessor had owned the subject property at the time that hazardous materials were disposed of on said property; but, rather, had owned the property after

(Continued on following page)

Furthermore, Petitioners' atatempt on page 19, note 11[17] of their Petition to distinguish *United States v. Bliss,* 667 F. Supp. 1298 (E.D. Mo. 1987) from the present case is misleading. Petitioners suggest that the *Bliss* court's decision to impose successor liability on one of the defendants in that case is based primarily on the fact that the successor continued the operations of its predecessor. What Celotex and Rapid-American have failed to recognize, however, is that the corporate successor in *Bliss* was not a successor by merger but rather had acquired the assets of an incorporated association. *Id.* at 1308. Thus, in order to hold the corporate successor liable at all, the Court necessarily had to examine whether the purchasing corporation continued the business of its predecessor.[18]

Such is not the case here, where the acquisition of Philip Carey was by means of a statutory merger not the purchase of assets. Under the applicable state statutes,

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(Continued from previous page)

such disposal and prior to plaintiff's ownership. The Court held that CERCLA does not impose liability on interim owners who do not themselves generate, transport or permit dumping of hazardous substances. Consequently, the Court concluded that, because the predecessor was not liable under CERCLA, the successor would not be liable.

[17]Petitioners in note 11 also refer to the case of T & E Industries, Inc. v. Safety Light Corp., 680 F.Supp. 696 (D.N.J. 1988) in which the Court imposed CERCLA liabilities. The Court in that case stated: "Safety Light admitted that it is the corporate successor of U. S. Radium, a corporation which clearly fits within the definition of responsible parties under CERCLA." *Id.* at 709.

[18]The Third Circuit correctly noted that when one corporation acquires the assets of another, "the successor will not be saddled with the seller's liability except under certain circumstances." 851 F.2d at 91 (citations omitted).

the successors by merger assume all liabilities, certain or contingent, of the predecessor. Thus, the fact that neither Celotex nor Rapid-American continued the business of Philip Carey is irrelevant.

Nor are Petitioners correct in their attempt to distinguish the decision in *Oner II, Inc. v. U.S.E.P.A.*, 597 F.2d 184 (9th Cir. 1979), a case relied on by the Third Circuit. Although in imposing successor liability under the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136 *et seq.*, the Court in *Oner* noted the fact that the successor in that case was aware of the predecessor's violations at the time it succeeded to the interests of the predecessor and that the successor continued in the business of distributing pesticides, the first, and Smith Land submits, foremost justification for doing so was to "facilitate enforcement of the Act." *Id.* at 186. The Court noted the purpose of the Act—to regulate pesticides to protect the national environment—and the "potential injury to the public for violations of the Act." *Id.* at 187.

Thus, the Third Circuit's imposition of corporate successor liability is consistent with the decisions of other courts and, as set forth more fully below, the policy behind remedial legislation such as CERCLA.

C. The Third Circuit's Decision To Impose Corporate Successor Liability Under CERCLA Is Consistent With And Effectuates Congressional Intent.

At page 15 of their Petition, Celotex and Rapid-American claim that because Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), does not list corporate successors as potentially responsible parties, the Third Circuit's deci-

sion to impose liability on them violates the language of the statute. This view of statutory interpretation is contrary to the uniform view of the many courts which have interpreted CERCLA and other remedial legislation.

Under established principles of statutory construction, Congress is presumed to act with knowledge of existing law and judicial interpretations of that law. *American Dredging Co. v. Local 25*, 338 F.2d 837 (3d Cir. 1964), *cert. denied*, 380 U.S. 935 (1965). Absent a clear manifestation to the contrary, a statute is presumed to be harmonious with existing law. *Finberg v. Sullivan*, 461 F. Supp. 253 (E.D. Pa. 1978), *vacated* 634 F.2d 50, *adhered to*, 658 F.2d 93 (1980). It is incongruous to infer that Congress intended to abrogate the law of successor liability without ever mentioning this in text.[19]

Moreover, the CERCLA statute is to be read broadly as a remedial statute. *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1112 (D. Minn. 1982) ("CERCLA should be given broad and liberal construction"). Where the primary purpose behind a statute is to promote safety and save lives, any method of enforcement which will encourage compliance should be viewed as consistent with the legislative scheme. *United States v. Blue Water Marine Industries, Inc.*, 661 F.2d 793 (9th Cir. 1981).

Petitioners' analogy comparing their position as successors by merger with those of individual corporate

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[19]The Petitioners' alleged examples of Congress expressly including provisions imposing liability on corporate successors appearing on page 16, note 9, actually involve liability on purchases of assets which, as noted previously, does not, by operation of law, result in the assumption of liabilities.

shareholders and officers of corporations liable under CERCLA is misplaced. Individual shareholders and corporate officers are not traditionally found liable for the actions of the corporation. The corporate form is used to protect them from such liabilities. Thus, in cases where such liability has been assessed, courts have been careful to base their decisions on the active participation of such persons in the complained of behavior.

Such is not the case where, as here, a court is examining the liability of the successor corporation itself. Courts have held successors liable for compensatory damages despite the lack of identity between predecessor and successor. *See, e.g., Dawejko v. Jorgensen Steel Co.*, 290 Pa. Super. 15, 434 A.2d 106 (1981) and *Ramirez v. Amsted Industries, Inc.*, 86 N.J. 332, 431 A.2d 811 (1981). Further, courts have even held that successor corporations can be found liable for punitive damages as a result of the acts of its predecessor. *See Neal v. Carey Canadian Mines, Ltd., supra, aff'd sub nom., Van Buskirk v. Carey Canadian Mines, Ltd., supra; Celotex Corp. v. Pickett, supra; contra In re Related Asbestos Cases*, 566 F. Supp. 818 (N.D. Cal. 1983) (under California Law).

Petitioners' final contention—that the principles of law providing for the assumption of a predecessor's liabilities by a successor corporation should be discarded in the name of promoting corporate mergers—must fail in light of Congress' clear intent in enacting CERCLA to encourage and facilitate the clean up of hazardous sites. *See Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986); *City of Philadelphia v. Stepan Chemical Co.*, 544 F. Supp. 1135 (E.D. Pa. 1982).

Through CERCLA, the United States Congress established a statutory scheme whereby hazardous substances would be removed from the environment and the removal costs would ultimately be shouldered by those persons responsible for the danger. *City of Philadelphia, supra.* To hold, as Celotex and Rapid-American demand, that a merger establishes a corporate escape clause from environmental liability would be contrary to public policy. Such a result would enable corporations to use a statutory merger to avoid and divest themselves of CERCLA liability for past generation and disposal of waste. Judicial acceptance of such an "escape clause" would effectively devastate the CERCLA statute.

Petitioners' attempt to carve out an exception to successor liability under CERCLA for situations where the contaminated property is sold prior to the events which gave rise to the predecessor-successor relationship is wholly without merit.

Such an exception to the well established doctrine of successor liability has never been recognized. Moreover, such an exception would permit corporations to avoid and divest themselves of CERCLA liability by selling sites just prior to entering into a corporate merger. Transporters, generators and operators of hazardous waste sites are appropriately held accountable for clean up costs because they profited from past disposal practices. If successor corporations are not held responsible when their predecessors were the transporters, generators and operators of these sites, mergers would allow these otherwise responsible persons under CERCLA to become unavailable for suit. This was not the intent of Congress.

In addition, any corporation which has made the business decision that a statutory merger is more advantageous than an asset acquisition will have factored in the realization that with the merger come all the liabilities—both unknown and contingent—and thus will have necessarily undertaken the investigation to reveal the extent of those liabilities. If that investigation reveals the potential for liability under CERCLA, then that can be factored into the value of the target company or, if necessary, the format of the acquisition itself.[20]

Finally, Petitioners claim, in essence, that it is improper to assess responsibility against them for acts done by Philip Carey prior to the enactment of the CERCLA statute.

The Third Circuit, however, offered the following quotation from Blackstone which speaks to the continuing vitality of a corporation:

> [A]ll the individual members that have existed from the foundation to the present time, or that shall ever hereafter exist, are but one person in law, a person that never dies: in like manner as the river Thames is still the same river, though the parts which compose it are changing every instant.

851 F.2d at 91 (quoting 1 W. Blackstone, *Commentaries* 467-69, quoted in *Polius v. Clark Equip. Co.*, 802 F.2d 75, 77 (3d Cir. 1986)).

Moreover, this contention, has been universally rejected by the courts. The courts have unanimously held

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[20]It has been alleged that those involved in the hazardous waste industry knew of the potential for extensive liability prior to CERCLA. *Developments in the Law—Toxic Waste Litigation*, 99 Harv. L. Rev. 1462, 1558-59 (1986).

that CERCLA does apply retroactively and that application to activities which transpired before the enactment of the statute does not present an unconstitutional violation of due process.

The court in *United States v. Ottati & Goss, Inc.*, 630 F.Supp. 1361, 1398 (D.N.H. 1985), held:

> [R]etroactive application of CERCLA § 107(a) to pre-CERCLA enactment activities does not violate due process. (Citations omitted.)

Moreover, the court in *United States v. Northeastern Pharm. & Chem. Co.*, 810 F.2d 726, 734 (8th Cir. 1987), *cert. denied*, — U.S. —, 108 S. Ct. 146 (1987), held that:

> [R]etroactive application of CERCLA to impose liability upon responsible parties for acts committed before the effective date of the statute does not violate due process.

As this Court so aptly stated in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976), a case in which this Court upheld a statute imposing strict liability upon employers of coal miners for black lung benefits,

> legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. . . . this is true even though the effect of the legislation is to impose a new duty or liability based on past acts. . . .

Thus, this Honorable Court should refrain from giving consideration to the eliminaton of corporate successor liability where the application of such liability is appropriate, consistent both with principles of corporate law and with the decisions of other courts, and furthers the intent of Congress in enacting CERCLA.

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CONCLUSION

Petitioners have raised no special and important reason which would merit this Court's extraordinary and discretionary certiorari jurisdiction. Smith Land & Improvement Corporation therefore respectfully urges the Court to deny this Petition for Writ of Certiorari.

Respectfully submitted,

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